SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

71 - 303

MICHAEL E. PAULDINO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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No. _____

IN THE
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UNITED STATES
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MICHAEL E. PAULDINO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Michael E. Pauldino, your Petitioner, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case, on June 4, 1971, affirming the United States District Court for the District of Colorado wherein Petitioner was convicted for interstate travel in aid of a racketeering enterprise in violation of 18 U.S.C. § 1952.

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Tenth Circuit entered on June 4, 1971 (Appendix A, infra) has not yet been officially reported.

No formal opinion was delivered by the United States District Court for the District of Colorado.

DATE OF JUDGEMENT AND TIME OF ENTRY

The Judgment of the United States Court of Appeals for the Tenth Circuit was entered on June 4, 1971. Petition for Rehearing was denied on July 1, 1971.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether 18 U.S.C.A. § 1952 can be construed as to prohibit a single incident of gambling in a state other than that of one's residence when the statute requires a "business enterprise involving gambling" in the foreign state, and only subsection (b) (2) has been interpreted as to proscribe single acts of conduct unlawful under the statute, namely bribery, extortion or arson.

2. Is the Tenth Circuit Court's construction of § 1952

so divergent and conflicting with the decisions of other circuits on the question of the construction of that statute as to have decided an important question of federal law which has not been settled by this Honorable Court; and which is so novel in its interpretation of the statute as to have violated Petitioner's Fifth Amendment rights and to have penalized Petitioner for his status.

3. Are the acts of the District Court, as sanctioned by the Tenth Circuit, in failing to grant Petitioner's Motion for Severance; in admitting prejudicial testimony of cheating; and by failing to hold the Government to its burden of proof such a departure from the usual and accepted course of judicial proceedings as to have violated Petitioner's constitutional rights thereby calling for an exercise of this Court's power of supervision.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

18 U.S.C. § 1952; in pertinent part:

"§1952. Interstate and foreign travel or transportation in aid of racketeering enterprises.

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to--

(3) . . . otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, . . .

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States."

Fifth Amendment to the Constitution of the United States:

> AMENDMENT V--CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment to the Constitution of the United States:

> AMENDMENT VI--In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation;

to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

Revised Statutes of the State of Nebraska.

(See Appendix C)

CONCISE STATEMENT OF THE CASE

Petitioner Michael Pauldino was indicted by a Federal Grand Jury on April 4, 1969, in a one count indictment for violation of 18 U.S.C.A. § 1952, charging that in November of 1966 the Defendant traveled from Denver to Albion, Nebraska with intent to promote, manage, establish and carry on an unlawful activity, said unlawful activity being a business enterprise involving gambling in violation of certain Nebraska statutes; and that thereafter the Defendant did certain acts to carry on the said unlawful activity.

The Petitioner and others had traveled to Albion, Nebraska. In Albion one Flanagan who owned a livestock sales barn was contacted concerning a business transaction. During this transaction someone mentioned drinking and one of the group, seeing dice upon a desk, suggested rolling dice to determine which of them would pay for the liquor. Thereafter a crap game ensued which involved the Petitioner, his other traveling companions and some local residents. Testimony revealed that the sales barn owner Flanagan and other Nebraska residents periodically shot craps. Flanagan's wife, who disapproved of gambling, interrupted the game, which was then moved to a nearby motel room. This was the only gambling activity shown to have taken place in Nebraska. In order to attempt to establish the "unlawful activity", namely a "business enterprise involving gambling" needed to substantiate the conviction under 18

U.S.C.A. § 1952, evidence was admitted at trial of other gambling activities of the Petitioner and of his Co-Defendant at trial.

An FBI agent testified that the Petitioner stated to a Colorado jury in 1966 that he was a professional gambler. Another FBI agent testified that as far back as 1953 the Co-Defendant admitted to being a gambler. A gambling casino owner from Elko, Nevada testified that the Petitioner and his Co-Defendant at trial had legally gambled at his casino in September of 1966. Testimony was introduced from a passenger on a flight from Seattle, Washington to Portland, Oregon that the passenger had observed the Petitioner playing cards on the airliner. The passenger alleged that the Petitioner won substantial amounts of money and that he thought that the petitioner cheated. A construction company owner from Canada and a Royal Canadian Mounted Police Officer then testified that the Petitioner's Co-Defendant had engaged in card games in Canada, and that the Mountie thought the Co-Defendant cheated, but this did not apply to the petitioner.

In addition to the witnesses testimony, income tax returns of the Petitioner and his Co-Defendant were introduced which showed that they had listed their occupations as "gambler". No foundation was laid for the introduction of the tax returns in evidence in that no showing was made that the Government had complied with 26 C.F.R. § 301. 6103(a) - 1(h). Although counsel for the Petitioner objected to the introduction of the tax returns and to the prejudicial affects of the introduction of testimony as to cheating, such evidence was admitted over his objections.

Upon this state of the evidence the Petitioner was convicted under the statute . The Tenth Circuit affirmed that conviction holding that the single act of gambling in Nebraska by the Petitioner was sufficient to establish the

"unlawful activity" within the purview of § 1952; and that there was insufficient error in the trial to require a reversal of the District Court decision; and by inference that the Petitioner's occupation constituted the necessary continuous business enterprise needed to show an unlawful activity.

REASONS FOR GRANTING THE WRIT

I. THE TENTH CIRCUIT BY ITS CONSTRUCTION OF 18 U.S.C.A. § 1952 HAS RENDERED A DECISION IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS ON THE SAME QUESTION AND HAS DECIDED IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT, IN THAT:

A. THE TENTH CIRCUIT CONSTRUCTION CONTRAVENES THE CONGRESSIONAL PURPOSE OF 18 U.S.C.A. § 1952.

18 U.S.C. § 1952 condemns interstate travel or the use of interstate facilities in furtherance of "any unlawful activity," defined as including "any business enterprise involving gambling." Legislative history of the statute indicates that the purpose was to punish those operating a gambling business outside the state of their residence. Attorney General Robert F. Kennedy stated in a letter in response to questions concerning the scope of a bill to Representative Owen Harris:

> "An example of the type of activity which we consider to be within the purview of the statute would be travel to promote a continuous course of conduct involving gambling. Thus a gambling house would be within the definition of unlawful activity and the bill and any travel on the part of any person with the intent to establish a gambling house and the

> further acts subsequent to the travel to promote that activity would be a violation of this section."
> 107 Cong. Rec., Part 12, Page 16542.

In an excerpt from the House hearings on that same bill, 107 Cong. Rec., Parts 12, 14, Page 339, Mr. Miller stated:

> "Mr. Chairman, in order for us to bring any prosecutive action under the statutes, the first thing we are going to have to prove is that there was a business that was unlawful under the laws of this state and that business involved the violations here."

And at Page 341, Mr. Miller stated:

> ". . . (T)his brings up the whole basic concept of this bill, that there is an organized course of conduct within the confines of a state which is unlawful. That is a condition precedent."

The sectional analysis of the bill stated that isolated violations would not come within its scope. U.S. Cong. & Admin. News 1961, Page 2666. Congressional intent behind § 1952 was not to punish such conduct as that of the Petitioner, but rather to punish one who establishes an entrenched gambling operation in a state other than that of his own residence.

B. THE CONDEMNATION OF A SINGLE ACT OF GAMBLING OUTSIDE ONE'S STATE OF RESIDENCE RAISES A QUESTION OF FIRST IMPRESSION AND CONTRADICTS APPARENTLY ALL PRIOR ADJUDICATIONS BY OTHER CIRCUITS CONSTRUING A "BUSINESS ENTERPRISE INVOLVING GAMBLING" IN VIOLATION OF § 1952.

In all cases wherein courts have determined that the particular activities carried on by the defendants were "business enterprises" within the proscriptions of § 1952, there

has been a showing of repeated unlawful activity within the state wherein such activity was unlawful. In every instance such activity was a course of conduct involving, in fact, a "business enterprise". In United States v. Brennan, 394 F.2d. 151 (2nd Cir. 1968) defendants operated a crap game aboard a boat some four to five times per week for a period of two months between New Jersey and New York. The courts found this to be a "business enterprise" because of its nature as an entrenched operation, its size, regularity, location and participants.

Other circuits upholding convictions under § 1952 for "unlawful activity" have done so under fact situations showing the facilitation or operation of an actual operation or enterprise such as running an illegal casino or gambling house: United States v. Roselli, 432 F.2d. 879 (9th Cir. 1970); Dillon v. United States, 391 F.2d. 433 (10th Cir. 1968); Hanley v. United States, 416 F.2d. 1160 (5th Cir. 1969) cert. den. 397 U.S. 91; Bass v. United States, 324 F.2d. 158 (8th Cir. 1963); United States v. Compton, 355 F.2d. 872 (6th Cir. 1966) cert. den. 384 U.S. 951; South v. United States, 368 F.2d. 202 (5th Cir. 1966); United States v. Barrow, 363 F.2d. 62 (3rd Cir. 1966) cert. den. 385 U.S. 1001; United States v. Teemer, 214 F.Supp. 952 (D.C. W. Va. 1963); United States v. Gebhart, 441 F.2d. 1261 (6th Cir. 1971); United States v. Izzi, 385 F.2d. 412 (7th Cir. 1967). Convictions have been upheld for bookmaking operations and wagering on sporting events which were continuous and repeated and carried on in the state wherein they were unlawful. United States v. Fuller, 441 F.2d. 755 (4th Cir. 1971); United States v. Puntillo, 440 F.2d. 540 (7th Cir. 1971); United States v. Kelly, 254 F.Supp. 9 (S.D. N.Y. 1966); United States v. Bergland, 318 F. 2d. 159 (7th Cir. 1963); United States v. Ross, 374 F.2d. 227 (6th Cir. 1967); United States v. Miller, 379 F.2d. 483 (7th Cir. 1967) cert.

den. 389 U.S. 930; United States v. Arnold, 380 F.2d. 366 (4th Cir. 1967). And running a numbers racket was held to be unlawful under § 1952 in United States v. Nichols, 421 F.2d. 570 (8th Cir. 1970).

Other circuits have specifically required that the acts of promotion, management and the carrying on of a business enterprise involving gambling be in the state wherein conducted unlawfully. United States v. Chase, 372 F.2d. 453 (4th Cir. 1967) cert. den. 387 U.S. 907; United States v. Ryan, 213 F. Supp. 763,764 (D.C. Colo. 1963); United States v. Compton, 365 F.2d. 1 (6th Cir. 1966) cert. den. 385 U.S. 956.

Moreover had the Congress intended to proscribe single acts of unlawful gambling, the statute would not be worded in terms of a "business enterprise involving gambling". Subsection (b) (2) of 18 U.S.C. § 1952 simply prohibits "extortion, bribery or arson", and has been construed as to prohibit a single act thereof. Unites States v. Catalano, 439 F.2d. 1100 (4th Cir. 1971); Marshall v. United States; 355 F.2d. 999 (9th Cir. 1966) cert. den. 385 U.S. 815, rehearing den. 385 U.S. 964. Thus had Congress intended to proproscribe single acts of gambling they would not have worded the statute in terms of a business enterprise but rather in the wording of (b) (2).

It would appear that the construction given § 1952 by the Tenth Circuit sustaining a conviction for a single incident of gambling in the State of Nebraska by a Colorado resident raises the question of first impression and is in conflict with the decisions of all the circuits cited supra.

C. THE TENTH CIRCUIT OPINION IS IN CONFLICT WITH THE DECISION OF THE FIFTH CIRCUIT.

In Rewis v. United States, 418 F.2d. 1218 (5. Cir. 1969),

reversed on other grounds, 400 U.S. 818 (1971), it was held that § 1952 did not make it a federal crime merely to cross a state line for the purpose of placing a bet and reversed the convictions of two Georgia residents because the evidence presented at trial was insufficient to show that they were anything other than customers of the gambling operation. The Tenth Circuit opinion conflicts with the holding in Rewis, supra, in that there was showing that the crap game wherein the Petitioner engaged was an established game conducted by Nebraska residents on the average of once or twice monthly. Under the holding in Rewis, supra, traveling to Nebraska on one occasion and engaging in an established dice game while there would not warrant conviction under § 1952.

D. THE TENTH CIRCUIT CONSTRUCTION OF § 1952 DEPARTS SO GREATLY FROM THE EXPECTED INTERPRETATION OF THAT STATUTE AS TO HAVE DEPRIVED THE PETITIONER OF PROPER NOTICE AND SO AS TO HAVE FORCED THE PETITIONER TO INCRIMINATE HIMSELF IN VIOLATION OF HIS FIFTH AMENDMENT GUARANTEES.

As argued supra, the construction by other circuits of § 1952 illustrate that the purpose of that statute was to prohibit the establishment and promotion of a gambling operation by one who lived outside the state in which such activity is unlawful. The Tenth Circuit has ruled that one who is a gambler by occupation and who engages in a single act of gambling outside his state of residence comes within the terms of the statute. Such a unique construction violates the rule that doubts in the enforcement of a penal statute be resolved in favor of lenity. Bell v. United States, 349 U.S. 81, 81-84 (1955). Such a construction of § 1952 would re-

quire that the Petitioner or any man of ordinary understanding would necessarily need to guess at the meaning of the statute. Such a construction violates the standards of due process. Lanzetta v. New Jersey, 306 U.S. 451 (1939); Connally v. General Construction Co., 269 U.S. 385 (1926). And the construction does violence to the common rule that statutes creating crimes are to be strictly construed in favor of the accused. United States v. Wiltberger, 5 Wheat 79, 95; Fasulo v. United States, 272 U.S. 620, 628.

Because of the unique construction given § 1952 the Petitioner could not have known that because he was a gambler by occupation that an isolated incident of gambling outside Colorado would fall within the confines of § 1952. The Petitioner could not have known that his occupation would be construed as continuous course of conduct comprising a business enterprise. Under the construction given by the Tenth Circuit, the Petitioner's admission that he was a gambler by occupation in his income tax return was highly incriminatory and prejudicial.

Thus the introduction of the tax returns of the Petitioner in evidence in his trial violated the Petitioner's privilege against self-incrimination. The Petitioner could not have voluntarily waived this privilege by listing his occupation in that he could not have been aware that § 1952 would be construed in a manner as done by the Tenth Circuit. In addition, his admission was not voluntary in that Petitioner acted under the compulsion of 26U.S.C.A., § 7206 and § 7207 while completing his income tax return. Omission or falsification of the Petitioner's occupation on his income tax return may have subjected him to the penalties of § § 7206 or 7207 and, moreover, such omission or falsification might have subjected the Petitioner to penalties of perjury in that Petitioner verified that the return was complete and correct to the best of his knowledge.

Because the Petitioner was required to complete all the information on his federal income tax return, and because of the novel construction given § 1952 by the Tenth Circuit, the introduction of Petitioner's income tax returns as evidence required Petitioner to incriminate himself and was done without a waiver of his privilege.

E. SUCH A DEVIATION FROM THE EXPECTED UNDERSTANDING OF THE LANGUAGE OF § 1952 BY THE TENTH CIRCUIT'S CONSTRUCTION HAS PENALIZED THE PETITIONER FOR HIS STATUS RATHER THAN FOR VIOLATION OF THE STATUTE.

As set forth in all the arguments supra the Tenth Circuit's construction stands unique in the law. Using the Petitioner's occupation to circumstantially prove intent to violate § 1952 has in fact amounted to a conviction for his status of being a gambler, rather than for the actual conduct proscribed by the statute. Such a status conviction violates due process. Robinson v. California, 370 U.S. 660 (1962); Fenster v. Leary, 20 N.Y.2d. 309, 282 N.Y.S.2d. 739, 229 N.E.2d. 426 (1967); Allegata v. Commonwealth, 231 N.E.2d. 201 (Mass. 1967); and Smith v. Hill, 285 F.-Supp. 556 (D.C.N.C. 1968).

What the ruling has done in effect is to restrict the freedom of travel of those persons who happen to be gamblers if they happen to gamble in another state. This construction could cause difficulties with Nevada residents traveling if followed by other circuits. Such a construction would also violate the Petitioner's right to travel. Shapiro v. Thompson, 389 U.S. 1932 (1969). The fact that the Petitioner was a gambler rather than a plumber was the sole basis for a federal prosecution for a felony as opposed to a state prosecution for a misdemeanor.

II. THE AFFIRMANCE OF A DISTRICT COURT OF COLORADO DECISION BY THE TENTH CIRCUIT SANCTIONS SUCH A DEPARTURE FROM THE USUAL AND ACCEPTED COURSE OF JUDICIAL PROCEEDINGS AS TO DENY PETITIONER A FAIR AND IMPARTIAL TRIAL AND SO AS TO DENY HIS CONSTITUTIONAL RIGHTS AS TO NECESSITATE AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The failure of the trial court to grant the Petitioner and Co-Defendant's Motion for Severance at the trial amounted to a denial of due process for the Petitioner herein. Evidence was admitted during the course of the trial involving individual activities of the Co-Defendant Bridwell. It was obvious to the Court that the introduction of transactions involving the Co-Defendant and evidence that he cheated in those transactions when most other evidence of the activities of the Petitioner were linked with the Co-Defendant could have harmful effects on the Petitioner's trial.

This Court has recognized that the effect of a cautionary instruction may not withdraw the harm done to one in the Petitioner's position. In Bruton v. United States, 391 U.S. 123, 135 (1968) in a somewhat analogous situation this Honorable Court stated:

> "... (T)here are some contexts in which the risk that the jury will not or cannot follow instructions is so great, and the consequences of failure so vital to defendant, that the practical and human limitations of the jury system cannot be ignored."

Other courts have also recognized that error cannot be cured by instructions to a jury to disregard the testimony. Maestas v. United States, 341 F.2d. 493 (10. Cir. 1965);

Marshall v. United States, 360 U.S. 310 (1959) and United States v. Smith, 403 F.2d. 74 (6. Cir. 1968).

In the Petitioner's case, gambling on an airplane was not alleged or proven to have been in violation of any state law, nor was there any violation of state law alleged or proven in the Elko, Nevada incident.

In addition, Petitioner asserts that the introduction of testimony that he cheated in a card game on the plane while traveling from Seattle to Portland was immaterial and irrelevant to the issue raised by the indictment. § 1952 requires only that the activity be unlawful and in violation of state law. Therefore only evidence of unlawful conduct is relevant and evidence of cheating is immaterial and indeed, highly prejudicial. The introduction of such prejudicial testimony precluded the Petitioner from receiving a fair and impartial trial, violating his Sixth Amendment rights.

No effort was made by the trial court to keep such evidence within its proper bounds. If evidence has no connection with any elements of the offense being tried, it may not be introduced merely to cast the defendants in a bad light. Roe v. United States, 316 F.2d. 617, 623 (5. Cir. 1963). Since there was no necessity that evidence of cheating be offered in a government's main case, the allowance of such testimony over vigorous objection by counsel for the Petitioner was such an abuse of discretion by the judge as to constitute plain error requiring reversal and an exercise of this court's power of supervision. United States v. Byrd, 352 F.2d. 570 (2. Cir. 1965) and United States v. Ross, 321 F.2d. 61, 67 (2. Cir. 1963). Evidence may be introduced to show intent but in order for evidence of wrongful acts to be admissible to prove intent they must be of such character that as a matter of logic they tend to demonstrate a criminal intent and the acts within the charge.

Hartman v. United States, 215 F.2d. 386, 393 (8. Cir. 1954).

The government in presenting its case demonstrated that Petitioner had gambled once in Nebraska. However, there is a substantial question whether Petitioner's conduct constituted a violation of the Nebraska gambling laws (See Appendix C). The cases are clear that specific intent to violate a state law is an essential element required to show a violation of § 1952. United States v. Chase, 372 F.2d. 453, (4. Cir. 1967) cert. den. 387 U.S. 907; United States v. Miller, 379 F.2d. 483 (7. Cir. 1966) cert. den. 389 U.S. 930; United States v. Compton, 355 F.2d. 872 (6. Cir. 1966) cert. den. 384 U.S. 951. No proof was offered as to confirm whether Petitioner, in fact, violated those specific statutes as required by law. Hanley v. United States, 416 F.2d. 1160 (5. Cir. 1969). In addition to failing to hold the government to its proper burden of proof, the trial court, by its instructions to the jury, did not properly charge the elements of the crime.

III. THIS PETITIONER INCORPORATES QUESTIONS PRESENTED BY CO-PETITIONER, JESS R. BRIDWELL, WHOSE PETITION WAS SUBMITTED JULY 30, 1971.

The Petitioner and Co-Petitioner, Jess R. Bridwell, were Co-Defendants in the trial court and were consolidated in the Tenth Circuit Court of Appeals for aral argument. Co-Petitioner has independent counsel who has filed a single Petition for Writ of Certiorari. Since counsel had agreed to divide the points to be covered, this Petitioner hereby requests that the Court consider the Petition for Writ of Certiorari of Jess R. Bridwell contemporaneously with the consideration of this Petition.

CONCLUSION

Petitioner respectfully submits that 18 U.S.C.A. § 1952 cannot be construed so as to penalize him for an isolated incident of gambling in a state other than that of his residence. The unique and unprecedented construction given § 1952 by the Tenth Circuit is in conflict with other circuits and presents an important question of the proper construction of this statute as to require a ruling by this Court.

In addition, the novel construction raises questions of proper notice as required by due process standards; and compels the Petitioner to incriminate himself, abrogating his Fifth Amendment rights. Furthermore, the deviations by the trial court as sanctioned by the Tenth Circuit from the usual and accepted course of judicial proceedings in admitting prejudicial testimony, failing to grant Petitioner's Motion for Severance, and failing to hold the government to its burden of proof have denied Petitioner a fair and impartial trial pursuant to the standards of due process as to call for this Court's exercise of its power of supervision.

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
MAY, 1971, TERM

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
vs.	)	Nos. 332–70
MICHAEL E. PAULDINO, a/k/a Mike Parker, and JESS RAYMOND BRIDWELL, a/k/a Ray Bradley, Defendants-Appellants.	)	333–70

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(District Court No. 69-CR-112)

Charles F. Brega, Denver, Colorado, for Appellants.

James A. Clark, Special Assistant United States Attorney, Denver, Colorado, (James L. Treece, United States Attorney, Denver, Colorado) for Appellee.

Before BREITENSTEIN and HILL, United States Circuit Judges, and LANGLEY, United States District Judge.

HILL, Circuit Judge.

Appellants Bridwell and Pauldino were convicted by a jury on an indictment charging them with violating 18 U.S.C. § 1952 by traveling in interstate commerce to Nebraska with intent to participate in illegal gambling in the prohibited modes and with actual performance of those acts. Bridwell and Pauldino take this direct appeal from their respective convictions.

In brief, the evidence, taken as we must in the light most favorable to the prosecution, [1] shows that about November 2, 1966, appellants traveled from Colorado to Nebraska where they were joined by two individuals named Dan Abbott and Roy O'Neal. The group set out to contact one Ray Flanagan, a livestock dealer in Albion, Nebraska. Initially appellants, using alias names, engaged Flanagan in a discussion about buying livestock. Apparently, in no time the conversation turned to rolling dice to see who would buy some liquor so that the group could have a drink together.

There was a dispute in the testimony whether the dice were produced by someone in appellants' group or whether Flanagan had the dice on his desk in the sales barn. At any rate, that one roll of the dice led to a game of craps. Several hours later, Flanagan's wife discovered the game going on in the sales barn and at that point the parties retreated to appellants' motel room to continue shooting craps into the evening. At one point, one of Flanagan's friends joined the game, but upon quickly losing several hundred dollars, he dropped out. Predictably, when the day's activities were totalled up, Flanagan lost some $8,400.

The government also introduced evidence tending to show that appellants were engaged in gambling as a business en-

[1] United States v. Mecham, 422 F.2d 838 (10th Cir. 1970); Collins v. United States, 383 F.2d 296 (10th Cir. 1967).

terprise and that their trip to Nebraska was made with intent to pursue this activity. In this respect, O'Neal testified for the government to the effect that O'Neal had called Bridwell in Colorado and asked him to come to Nebraska because they "might find some gambling or something." Furthermore, O'Neal stated that Bridwell gave him several hundred dollars of the money won off Flanagan for "calling him (Bridwell) up there."

There was also testimony from an FBI agent about an incident in 1966 wherein Pauldino described himself as a professional gambler. Another agent testified that as far back as 1953 Bridwell claimed that he made his livelihood from gambling. Several other witnesses took the stand to testify about appellants' gambling activities just prior to and after the incident in Nebraska. Their testimony describes a craps game in Nevada in September, 1966, wherein appellants won some $30,000; a blackjack game in an airplane between Seattle and Portland in May, 1966, wherein appellants won some $1,200; and a card game in Canada in November, 1967, where appellant Bridwell, operating alone, won a considerable sum. Finally, as evidence that appellants were engaged in gambling as a business, their respective 1966 income tax returns were entered into evidence because each appellant had therein described his occupation as "gambler".

Appellants primarily argue on appeal that the evidence was insufficient in three respects to prove a violation of 18 U.S.C. § 1952: (1) The evidence did not show a "business enterprise" as the term is defined in the statute; (2) the government failed to establish that appellants traveled interstate with the requisite intent; and (3) the evidence failed to establish that they conducted the unlawful activity in all of the prohibited modes listed conjunctively in the indictment.

On the question of whether there was evidence that appellants were involved in a gambling business enterprise, it

must be noted that § 1952 makes it a crime to travel interstate to participate in unlawful activities, including gambling, only when those unlawful activities amount to a business enterprise. Obviously the anti-racketeering statute is not aimed at the fellow who, in a single instance, engages in gambling. Rather, the purpose of the statute is to get at those who engage in illegal gambling as a business and who utilize facilities of interstate commerce in furtherance of this business, thereby remaining effectively beyond the reach of state authorities. 2/

As we understand appellants' argument, they contend that under the language of § 1952 their activities in Nebraska alone must constitute a business enterprise in that state before a violation of the statute occurs. On this premise, appellants take refuge in the fact that the government's evidence only showed that they participated in one gambling incident in Nebraska, that being when they shot craps with Flanagan. Appellants conclude that proof of the lone incident does not show that they were involved in the business of gambling in Nebraska.

The reading of the statute which appellants propose is not supported by the cases they rely upon. In fact, no reported case has come to our attention which is authority directly on the issue posed. However, from the plain words of the statute, it is our determination that the government's evidence in this case was sufficient to prove a business enterprise within the purview of § 1952. Representative of the evidence establishing this were appellants' respective tax returns for 1966 which acknowledged gambling as each's occupation. In addition, there was a wealth of undisputed testimony concerning appellants' gambling forays across the country, even extending into

2/ 2 United States Code, Cong. and Admin. News (1961), pp. 2664-7; see Rewis v. United states, U.S. (1971).

Canada. "Suffice it to say that it was well established that appellants' trip to Nebraska was not an isolated gambling incident but was just one more roll of the dice in their continuing effort to fleece the lambs of the land. Appellants' gambling was well within the clear meaning of a business enterprise involving gambling as that phrase is used in § 1952. [3]

Next appellants contend that the government failed to prove that they traveled to Nebraska with the requisite intent. The argument is that the evidence shows that appellants traveled to Nebraska in search of livestock to purchase, and the subsequent gambling was merely a spur of the moment thing which was not an immediate purpose of the trip. While there was evidence that when appellants first met Flanagan they talked to him about purchasing some livestock, there was also testimony from O'Neal that O'Neal called Bridwell in Colorado and encouraged Bridwell to meet O'Neal in Nebraska to find some gambling. O'Neal's testimony also indicated that after the craps game with Flanagan, O'Neal received "courtesy money" from Bridwell as sort of a finder's fee for getting Bridwell into a game of craps. This evidence, together with the natural inferences that may be drawn therefrom, provided a sufficient basis for the jury to find that appellants traveled to Nebraska with the primary intent to engage in gambling as prohibited in § 1952.

Appellants also believe that the evidence was insufficient because the government's case did not prove every point in the indictment which charged appellants with traveling interstate "with intent to promote, establish, carry on and facilitate the promotion, management, establishment and carrying on of an unlawful activity." As is apparent, the indictment charged appellants in the conjunctive while the statute reads in the disjunctive. However we do not believe that the government's

3 Cf. Spinelli v. United States, 382 F.2d 871 at 889 (8th Cir. 1967), rev'd on other grounds, 393 U.S. 410 (1969).

proof of some but perhaps not all of the prohibited modes of violating the statute constitutes a fatal defect in appellants' conviction. It is settled that where a crime denounced disjunctively in the statute is charged in the conjunctive, proof of any one of the allegations will sustain a conviction.[4]

We now turn to appellants' contentions concerning the admissibility of certain evidence. First, appellants object that their respective tax returns for 1966 were admitted into evidence although there was no showing by the government that the government had complied with 26 C.F.R. § 301.6103 (a)-1(h). The regulation in question governs the use of tax returns in litigation and requires that a United States Attorney seeking to use a return in litigation not involving revenue laws laws shall make written application for the return or copies thereof with the Commissioner of Internal Revenue. Appellants urge that the government's failure to prove conformity with the regulation is fatal error.

We find no prejudicial error resulting from the government's use of the tax returns. Even assuming that in fact the application was not made in conformity with the regulation, it is difficult to say that for this reason alone the returns were not admissible as evidence. The regulation in question appears to be an administrative procedure and is in no way related to evidentiary rules governing the admissibility of evidence. The probative value of the returns as evidence in a courtroom is neither enhanced nor diminished by compliance with the regulation. We cannot conclude that otherwise admissible tax returns became inadmissible simply because the government did not bother to show in its case that, indeed, written application had been made to use the returns.

4 McGriff v. United States, 408 F.2d 333 (9th Cir. 1969); Rimerman v. United States, 374 F.2d 251 (8th Cir. 1967); Turf Center, Inc. v. United States, 325 F.2d 793 (9th Cir. 1963).

Appellants further argue that it was error to admit the returns into evidence because, according to appellants, the jury may have inferred tax evasion due to the fact that the income reported on their returns was at odds with the evidence of their gambling winnings in 1966. While it is true that in certain cases such as South v. United States, 368 F.2d 202 (5th Cir. 1968) evidence is inadmissible if it tends to prove an unrelated offense this case does not fall into that category. In South v. United States, supra, tax returns were admitted in a § 1952 prosecution solely to show the accused's reported income. From the accused's nominal reported income, which was manifestly too small to live on, the government sought to argue that the accused must have had additional unreported income from illegal gambling sources. The court in South, in a well reasoned opinion, determined that proof of the accused's meager reported income was probative of nothing related to the gambling offense in question. But the tax returns, coupled with the prosecutor's remarks, were highly suggestive of tax evasion although that was not an offense being tried.

Our case is in a significantly different posture. Beyond the fact that appellants did not object to the admission of the tax returns at trial, Bridwell and Pauldino's returns were admitted solely to show that on appellants' respective 1966 returns each claimed that his occupation was gambling. Income reported on their returns was not referred to at trial, and in fact the reported incomes on the exhibits were not insubstantial so as to immediately suggest tax evasion. In summary, the tax returns were probative evidence on the issues tried, and unlike the situation in South, no intimation was made to the jury that appellants were at least guilty of tax evasion. Hence, it is unreasonable to assume that the jury improperly used the evidence in coming to their guilty verdict.

In a similar vein, appellants raise a question whether it was proper to admit the testimony concerning their gambling

activities prior to and after their Nebraska trip. While, as we have indicated above, evidence of illegal activities other than the ones charged is not ordinarily admissible, there is an exception if the evidence establishes a course of conduct, scheme, design or intent.[5] In this regard, we think there is no question but that the evidence had probative value as proof that appellants were engaged in gambling as a continuous enterprise. The trial judge instructed the jury that they should consider the evidence only for resolving the question of whether appellants were engaged in gambling as a business. The evidence was properly admitted.[6]

Tacking a different course, appellants also object to the testimony about their gambling activities outside Nebraska as contrary to the trial court's pre-trial order that neither appellant's criminal record should be brought out in the government's case. Appellants now contend that the evidence concerning their gambling activities outside Nebraska was tantamount to evidence of their prior criminal records. Appellants' contention is specious. The evidence in this case made no mention of appellants' criminal records, nor is this case comparable to cases where, for instance, mug shots were introduced which indirectly, if not directly, inferred the accused's previous trouble with the police. Our reading of the record discloses no subterfuge resorted to by the prosecution to inform the jury that appellants had police records.[7]

Further argument is made that it was error to admit the FBI agent's testimony that as far back as 1953 Bridwell was

5 Havelock v. United States, 427 F.2d 987 (10th Cir. 1970); United States v. Eagleston, 417 F.2d 11 (10th Cir. 1969).

6 See Collins v. United States, supra.

7 Cf. Dillon v. United States, 391 F.2d 433 (10th Cir. 1968).

a gambler. Appellants urge that the remoteness in time from the charged offense negates the probative value of this evidence. If there be error in this respect, it staggers the imagination to believe that this bit of testimony in the course of the whole trial had any substantial influence on the jury's verdict. Only errors which affect substantial rights are prejudicial and require reversal.[8]

It is argued that the trial court erred in failing to grant appellants' motion for severance. As previously indicated, at trial the government produced extensive testimony concerning Bridwell's gambling activities in Canada. Pauldino was not involved in those activities, and he believes that nevertheless the jury may have considered that evidence as proof of his guilt. We are not persuaded by this argument. It is well settled that there is nothing per se improper about admitting evidence relating to one co-defendant but not relating to other co-defendants.[9] In view of the trial court's cautionary instruction that the evidence was applicable only to Bridwell and not applicable to Pauldino, we do not believe that its admission prejudiced Pauldino in the eyes of the jurors. The evidence was presented merely to establish Bridwell's gambling occupation and to support the other evidence that the trip to Nebraska was for the purpose of gambling and not for the purpose of buying livestock. There was already a wealth of evidence establishing the same facts concerning Pauldino. In sum we are not convinced this evidence was misused by the jurors and influenced them in reaching their verdict against Pauldino. Hence we can find no clear abuse of discretion in denying separate trials.

We now turn to the conteption that there was no evidence

8 Havelock v. United States, supra.

9 Opper v. United States, 348 U.S. 84 (1954); Dillon v. United States, supra.

that Pauldino traveled to Nebraska with intent to engage in gambling. Without question, there was no direct evidence proving either Bridwell or Pauldino's intent when they made the trip. However, the circumstances of O'Neal's call to Bridwell and the payoff to O'Neal are grounds to infer Bridwell's requisite intent. Further evidence connecting Pauldino with Bridwell in other gambling escapades, plus Pauldino's acknowledged sole occupation as a gambler, provides sufficient circumstantial evidence of Pauldino's intent in traveling to Nebraska. The conduct of Pauldino within a reasonable time before and after the trip are circumstances which the jury could rightly consider in determining intent, motive or purpose.[10]

Lastly, appellants submit that it was error to allow the witnesses who testified about the gambling episodes in Washington and Canada to further testify that appellants cheated on those occasions. Appellants complain that the evidence of whether they cheated was irrelevant to the charge and highly prejudicial. Having closely read the record, we believe that the evidence of cheating on those occasions tied in with the testimony that in their game with Flanagan, appellants never bet against each other and would always bet against Flanagan and his friend. In short, the evidence showed all the more clearly that appellants were professional gamblers and that the Nebraska incident was just a typical episode in their larger effort to make a livelihood from illegal gambling throughout the country.

AFFIRMED.

10 Brooks v. United States, 309 F.2d 580 (10th Cir. 1962).

APPENDIX B

MAY TERM – JULY 1, 1971

Before Honorable Jean S. Breitenstein, and Honorable Delmas C. Hill, Circuit Judges; and Honorable Edwin Langley, District Judge.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v. No. 332-70

MICHAEL E. PAULDINO
aka Mike Parker

Defendant-Appellant.

Upon consideration of petition of appellant for rehearing, it is ordered that said petition be and is hereby denied.

APPENDIX C

Revised Statutes of the State of Nebraska:

28-941. Games of chance, defined; penalty: pari-mutuel wagering, bingo, when permitted. Whoever, at any time, plays in any ordinary, tavern or race field, or in any booth, arbor, outhouse or other erection connected with such tavern, ordinary or race field, or at any other public place, at any game whatsoever, except games of athletic exercise, or bets or wagers on the hands or sides of such as do play as aforesaid, shall pay a fine in any sum not exceeding one hundred dollars; Provided, that nothing herein shall be construed to prohibit or punish wagering on the result of horse races by the pari-mutuel or certificate method when conducted by licensees within the race track enclosure at licensed horse race meetings; and provided further, nothing herein shall be construed to prohibit or punish the playing of bingo when conducted by any licensee operating pursuant to sections 9-101 to 9-121.

28-942. Games of chance; suffering same to be played on private premises. Whoever suffers any game or games whatsoever to be played for gain upon or by means of any gaming device or machine of any denomination or name, in his, her or their house, or any outhouse, booth, arbor or erection, of which he, she or they have the care or possession, shall each pay a fine of not less than fifty nor more than two hundred dollars.

28- 947 Common gambler, defined; penal. Whoever keeps or exhibits any gaming table, establishment, device or apparatus, to win or gain money or other property of value, or

aids, assists or permits others to do the same, or whoever engages in gambling for a livelihood, or shall be without any fixed residence, and in the habit or practice of gambling, shall be deemed and taken to be a common gambler, and shall be imprisoned in the county jail not less than one nor more than six months, and be fined in any sum not exceeding five hundred dollars.